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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-84755; File No. SR-NYSE-2018-60]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 15 Relating to the Reference Price for Exchange-Listed Securities

December 7, 2018

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on December 4, 2018, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 15 relating to the Reference Price for Exchange-listed securities. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 15 relating to a security's Reference Price that is used in determining whether to publish a pre-opening indication prior to an opening auction in a security that is already listed on the Exchange. The Exchange proposes to use the "Official Closing Price" ("OCP") rather than the last reported sale price<sup>4</sup> as an Exchange-listed security's Reference Price and to clarify that such Reference Price would be adjusted as applicable based on the publicly disclosed terms of a corporate action.

Rule 15(a) states that a pre-opening indication will include the security and the price range within which the opening price is anticipated to occur and that a pre-opening indication is published via the securities information processor and the Exchange's proprietary data feeds. Rule 15(b) provides that a designated market maker ("DMM") will publish a pre-opening indication either: (i) before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the "Applicable Price Range," as specified in Rule 15(d),<sup>5</sup> from a specified "Reference Price," as specified in Rule 15(c); or (ii) if a security has not opened by 10:00 a.m. Eastern Time. Accordingly, the Reference Price operates as a trigger for whether to publish a pre-opening indication. The pre-opening indication

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<sup>4</sup> All references to "last reported sale price" or "last-sale eligible trade" are to a trade that is of at least one round lot.

<sup>5</sup> Under Rule 15(d)(1), the Applicable Price Range for determining whether to publish a pre-opening indication is 5% for securities with a Reference Price over \$3.00 and \$0.15 for securities with a Reference Price equal to or lower than \$3.00.

price range that is published is based on where the opening price is anticipated to occur; the Reference Price is not published as part of the pre-opening indication.

Rule 15(c)(1)(A) specifies that the Reference Price for a security (other than an American Depositary Receipt) that is already listed on the Exchange will be the security's last reported sale price on the Exchange.<sup>6</sup> The Exchange proposes to amend Rule 15(c)(1)(A) to: (i) use the Official Closing Price rather than the last reported sale price as an Exchange-listed security's Reference Price; and (ii) specify that the Official Closing Price would be adjusted as applicable based on the publicly disclosed terms of a corporate action.

*Official Closing Price.* Currently, the reference in Rule 15(c)(1)(A) to a security's "last reported sale price" means the last round-lot sale price on the Exchange that is reported to the Consolidated Tape, which includes the closing transaction price of a round lot or more in a security, and if there was no closing transaction, the last round-lot sale price on the Exchange in that security. For example, if there was no closing transaction, and the last reported sale price of a round lot or more on the Exchange was from 3:30 p.m., the Exchange would use that 3:30 p.m. last reported sale price as the Reference Price for Rule 15(c)(1)(A). If there was no reported sale price the prior day, the Exchange will use the last reported sale price, regardless of how long ago it was published.

The Exchange proposes to update the terminology used in Rule 15(c)(1)(A) to reference the term OCP rather than reference a security's "last reported sale price." When the OCP is

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<sup>6</sup> See Rule 15(c)(1). Rule 15(c)(1)(B) - (D) also specifies what the Reference Price will be for a security that is the subject of an initial public offering, that is transferred from another securities market, or that is listed under Footnote (E) to Section 102.01B of the Listed Company Manual.

determined under Rule 123C(1)(e)(i),<sup>7</sup> use of such OCP for purposes of Rule 15(c)(1)(A) would result in the same Reference Price as under the current rule using the last reported sale price.<sup>8</sup> In addition, by referencing the OCP, the proposed amendment to Rule 15(c)(1)(A) would provide for a new method for determining the Reference Price if the Exchange is unable to conduct a closing transaction due to a systems or technical issue. In such case, Rules 123C(1)(e)(ii) and (iii) specify that the OCP would be determined via one of the contingency procedures specified in that rule, the selection of which depends on whether the Exchange determines that it cannot conduct a closing auction before or after 3:00 p.m. Eastern Time.<sup>9</sup>

The Exchange believes that it is appropriate to amend Rule 15(c)(1)(A) to reference the OCP instead of the last reported sale price because using the OCP as determined under Rules 123C(1)(e)(i), (ii), or (iii) as the Reference Price would cover all potential contingencies and reflect the most recent valuation in a security, including situations where the Exchange is unable

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<sup>7</sup> In 2015, the Exchange amended Rule 123C to define the term OCP and specified how the Exchange would determine the OCP for a security. See Securities Exchange Act Release No. 76598 (December 9, 2015), 80 FR 77688 (December 15, 2015) (SR-NYSE-2015-62) (Notice of filing and immediate effectiveness of proposed rule change).

<sup>8</sup> Rule 123C(1)(e)(i) provides that “[t]he Official Closing Price is the price established in a closing transaction under paragraphs (7) and (8) of [Rule 123C] of one round lot or more. If there is no closing transaction in a security or if a closing transaction is less than a round lot, the Official Closing Price will be the most recent last-sale eligible trade in such security on the Exchange on that trading day.” Rule 123C(7) and (8) specify the allocation process for the closing transaction. Rule 123C(1)(e)(i)(A) provides that “[i]f there were no last-sale eligible trades in a security on the Exchange on a trading day, the Official Closing Price of such security will be the prior day’s Official Closing Price.” Taken together, these provisions would result in the same Reference Price as under the current rule using the last reported sale price.

<sup>9</sup> In 2016, the Exchange further amended Rule 123C to modify how the Exchange would determine an OCP if the Exchange is unable to conduct a closing transaction due to a systems or technical issue. In general, Rules 123C(1)(e)(ii) or (iii) provide that the OCP would be either an official closing price from a designated alternate exchange or a volume weighted average price of the consolidated last-sale eligible trades of the last five minutes of trading during regular trading hours. See Securities Exchange Act Release No. 78015 (June 8, 2016), 81 FR 38747 (June 14, 2016) (SR-NYSE-2016-18).

to conduct a closing auction due to a systems or technical issue. For example, if for a security the last reported sale price on the Exchange was at 2:00 p.m., and then the Exchange uses either Rule 123C(1)(e)(ii) or (iii) to determine an OCP, the Exchange believes that the OCP that is determined as of the close of trading is more reflective of the value of such security as compared to the Exchange's last reported sale price at 2:00 p.m.

*Corporate Actions.* The Exchange also proposes to amend Rule 15(c)(1)(A) to specify that the OCP used as the Reference Price would be adjusted as applicable based on the publicly disclosed terms of a corporate action. The Exchange notes that currently, the Reference Price under Rule 15(c)(1)(A) for a security that is the subject of a corporate action would be adjusted based on the publicly disclosed terms of the corporate action before it is used to determine whether to publish a pre-opening indication. For example, if an Exchange-listed security that closed the previous day with an Official Closing Price of \$50 per share is subject to a 2-for-1 stock split, the Reference Price used for Rule 15(c)(1)(A) would be \$25 per share, consistent with current practice.<sup>10</sup>

Similarly, if a security is the subject of a non-standard corporate action, such as a merger or recapitalization, currently, the last reported sale price would be adjusted based on the publicly disclosed terms of the corporate action. For example, assume a listed company is being recapitalized in a merger transaction in which the Exchange-listed security (Class A) is exchanged for a cash dividend of \$10 per share of Class A stock plus two shares of the common stock of a new holding company (New Holdco Common). If the Class A stock is trading at a price of \$90 prior to the corporate action, the Reference Price under Rule 15(c)(1)(A) for each share of New Holdco Common Stock would be \$40 per share (i.e.,  $(\$90 - \$10) \div 2$ ). The

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<sup>10</sup> This represents an example of a "standard" corporate action, such as a stock split, reverse stock split, or dividend payment.

Exchange believes that this process ensures that a Reference Price accurately reflects the value of the security after a corporate action. To promote transparency in its rules, the Exchange proposes to codify this practice in Rule 15(c)(1)(A) so that member organizations and market participants are appropriately advised of how the Reference Price is determined for securities that are subject to a corporate action.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>11</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>12</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that using the OCP instead of the last reported sale price on the Exchange would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would align Rule 15(c)(1)(A) with how the Exchange determines the OCP for a security and would cover all potential contingencies if there is no closing transaction on the Exchange, including if the Exchange is unable to conduct a closing transaction due to a systems or technical issue. The proposed amendment would maintain that the Reference Price is the price of a last sale of at least one round lot, and therefore promotes just and equitable principles of trade because it is consistent with Rule 123C(1)(e)(i) which requires that the OCP be either the price of the closing transaction, or the last-sale eligible trade on the

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

Exchange when there is no closing transaction or the closing transaction is less than one round lot. The proposal would, therefore, continue to ensure that the Reference Price is an accurate indicator for determining whether a pre-opening indication of interest should be published. The proposed amendment would also enable the determination of a Reference Price under Rule 15(c)(1)(A) to account for when the OCP is determined via one of the contingency procedures set forth in Rules 123C(1)(e)(ii) and (iii). The Exchange believes that referencing the OCP rather than the last reported sale price would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would result in a Reference Price that is more reflective of the most recent value of the security value because the OCP as determined under Rules 123C(1)(e)(ii) or (iii) would be a price determined as of the close of trading, rather than the Exchange's last reported sale price, which may occur earlier in the trading day.

The Exchange believes that amending Rule 15(c)(1)(A) to specify that the OCP would be adjusted as applicable based on the publicly disclosed terms of a corporate action would remove impediments to and perfect the mechanism of a free and open market and a national market system by promoting transparency in Exchange rules of how the Reference Price is determined if a security listed on the Exchange is subject to a corporate action. The Exchange believes it is consistent with the protection of investors and the public interest to adjust the OCP that would be used as a Reference Price under Rule 15(c)(1)(A) based on the publicly disclosed terms of a corporate action as such adjusted price would better reflect the price of the security for purposes of the opening auction on the first day that a corporate action is in effect. The Exchange notes that the Reference Price is used as a trigger for determining whether to publish a pre-opening indication, and having a Reference Price more closely aligned to the updated value of the

security, based on the terms of the corporate action, would promote a more efficient opening process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to promote clarity and transparency in Exchange rules regarding how a Reference Price under Rule 15 is determined for an Exchange-listed security. The proposed rule change is therefore not designed to address any competitive concerns but rather inform member organizations that the OCP would be used as the Reference Price for listed securities, adjusted as applicable based on the publicly disclosed terms of a corporate action.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.<sup>15</sup>

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>16</sup> normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>17</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. In its filing with the Commission, the Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing to provide greater transparency to investors regarding how a security's Reference Price would be adjusted if that security is subject to a publicly disclosed corporate action and avoid potential investor confusion that could arise during the operative delay period. According to the Exchange, waiver of the operative delay period would also avoid potential investor confusion because the proposal will clarify when a pre-opening indication would be published based on the security's Reference Price.

The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it will provide transparency to investors on the determination of the Reference Price for Exchange listed securities, which is used as the basis for determining when pre-opening indications will be published, as well as provide transparency on the adjustments that will be made to the Reference Price as a result of corporate actions. For these reasons, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.<sup>18</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

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<sup>16</sup> 17 CFR 240.19b-4(f)(6).

<sup>17</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>18</sup> For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>19</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2018-60 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2018-60. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

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<sup>19</sup> 15 U.S.C. 78s(b)(2)(B).

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2018-60, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

Brent J. Fields,  
Secretary.

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<sup>20</sup> 17 CFR 200.30-3(a)(12).

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